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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

IN RE GABRIEL C., a Person Coming  
Under the Juvenile Court Law.

H039538  
(Santa Clara County  
Super. Ct. No. JV39312)

THE PEOPLE,

Plaintiff and Respondent,

v.

GABRIEL C.,

Defendant and Appellant.

Minor Gabriel C.<sup>1</sup> challenges the constitutionality of two of the felony probation conditions imposed by the juvenile court after he admitted the felony of possessing marijuana for sale. (Health & Saf. Code, § 11359.) For the reasons stated here, we find elements of each of the two conditions constitutionally infirm. We will accordingly modify the conditions and affirm the order as modified.

**I. JUVENILE COURT PROCEEDINGS**

As summarized in the suitability for deferred entry of judgment (DEJ) report prepared by the Probation Department, a police officer assigned to minor's high school

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<sup>1</sup> Although we recognize Gabriel C. reached the age of 18 during the pendency of the juvenile court proceedings, we refer to him as "minor" because he was a minor when he committed the charged offense.

searched minor and found, among other things: a glass pipe, a plastic baggie with several smaller red bindles containing a “green leafy substance,” and a lighter. The District Attorney filed a juvenile wardship petition under Welfare and Institutions Code section 602, subdivision (a), alleging one count of felony possession for sale of marijuana and indicating that minor was eligible for DEJ. (Health & Saf. Code, § 11359.)

The Probation Department recommended minor for DEJ. Minor admitted the single count of the wardship petition, acknowledged that the maximum sentence for that offense would be three years, and the juvenile court deferred entry of judgment. However, after minor later failed to satisfy the conditions of his DEJ contract, the juvenile court sustained the wardship petition and placed minor on felony probation. Minor’s order of probation contained 29 conditions, two of which are challenged on appeal.

Condition 13 states, “[t]hat said minor not change his place of residence without prior approval of the Probation Officer.” Condition 20 states, “[t]hat said minor not knowingly own, use, or possess an object that is capable of being used in a dangerous or deadly manner, or remain in any place where another person possesses an object capable of being used in a dangerous or deadly manner.”

## **II. DISCUSSION**

Minor challenges probation conditions 13 and 20 as unconstitutionally vague and overbroad. Although juvenile courts have wide latitude in fashioning “any and all reasonable conditions that it may determine fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced” (Welf. & Inst. Code, § 730, subd. (b); *In re Sheena K.* (2007) 40 Cal.4th 875, 889 (*Sheena K.*)), that discretion is limited by the state and federal constitutions. A probation condition may be challenged as unconstitutionally vague or overbroad even when, as here, minor did not object below, so long as the claim presents a pure question of law that can be resolved without reference to the sentencing record. (*Sheena K.*, *supra*, at pp. 887-889.)

Vagueness challenges are based on “the due process concept of ‘fair warning.’ [Citation.]” (*Sheena K.*, *supra*, 40 Cal.4th at p. 890.) A condition “ ‘must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated’ ... [Citation.]” (*Ibid.*) Overbreadth occurs when a probation condition “substantially limits a person’s rights and those limitations are not closely tailored to the purpose of the condition.” (*People v. Harrison* (2005) 134 Cal.App.4th 637, 641.) Thus, “[a] probation condition that imposes limitations on a person’s constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad.” (*Sheena K.*, *supra*, 40 Cal.4th at p. 890.)

#### **A. CONDITION REGARDING CHANGE OF RESIDENCE**

Minor claims condition 13, mandating that he “not change his place of residence without prior approval of the Probation Officer” is unconstitutionally overbroad because it limits his constitutional rights to travel and association without being narrowly tailored to the rehabilitative purposes of probation. Minor further argues that the condition does not provide any standard to guide or limit a probation officer’s discretion in determining whether to approve a change of residence request.

Although courts may leave “many details that invariably are necessary to implement the terms of probation” to a probation officer, (*People v. O’Neill* (2008) 165 Cal.App.4th 1351, 1358-1359), conditions should not delegate “unfettered discretion” to a probation officer. (*People v. Leon* (2010) 181 Cal.App.4th 943, 953 (*Leon*).) In *Leon*, one of an adult probationer’s probation conditions prohibited attending court proceedings without the permission of his probation officer. (*Id.* at p. 952.) The court found the condition overbroad because it lacked a standard for granting or withholding approval. (*Id.* at p. 954.)

Like the pre-approval condition in *Leon*, condition 13 provides no standard to guide a probation officer’s discretion in determining whether to approve a request from

minor to change his residence. The People argue that the condition is narrowly tailored because the probation officer needs to know minor's address to effectively monitor his compliance with probation conditions. We acknowledge that monitoring a ward's whereabouts and living situation is a valid and compelling purpose. However, unlike condition seven, which requires minor to "[n]otify the Probation Officer of any anticipated change of address or other important changes," condition 13 impermissibly delegates the court's discretion to the probation officer without providing standards for the exercise of that discretion. We therefore modify condition 13 to read: "That said minor not change his place of residence without prior approval of the court."<sup>2</sup>

**B. CONDITION REGARDING OBJECTS "CAPABLE OF BEING USED IN A DANGEROUS OR DEADLY MANNER"**

Condition 20 states that minor shall "not knowingly own, use, or possess an object that is capable of being used in a dangerous or deadly manner, or remain in any place where another person possesses an object capable of being used in a dangerous or deadly manner." Minor challenges two aspects of this condition. First, minor argues the condition's mandate that he not "remain in any place where another person possesses an object capable of being used in a dangerous or deadly manner" is unconstitutionally vague and overbroad because it "does not require that *he know*" that the other person has such an object. Second, he claims the phrase "object that is capable of being used in a dangerous or deadly manner" is unconstitutionally overbroad.

**1. Association with Persons Possessing Dangerous or Deadly Objects**

Minor argues that without explicitly requiring that he know that another person possesses a dangerous or deadly object, condition 20 impinges his constitutional rights to

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<sup>2</sup> *People v. Bauer* (1989) 211 Cal.App.3d 937, 944-945, and *In re Babak S.* (1993) 18 Cal.App.4th 1077, 1084-1086, which discussed conditions somewhat similar to condition 13, are distinguishable because they involved conditions deemed tantamount to banishment. As the threat of banishment is not present here, those cases do not support further modification of condition 13.

due process, travel, and association. The People's response is twofold. First, they argue that condition 20 provides a knowledge requirement because the term "knowingly" is present in the condition. Second, they argue that condition 20 contains an implied scienter element.

The People's first argument-that "knowingly" in condition 20 modifies the association phrase-is not supported by the text of the condition. Condition 20 reads: "That said minor not knowingly own, use, or possess an object that is capable of being used in a dangerous or deadly manner, or remain in any place where another person possesses an object capable of being used in a dangerous or deadly manner." The condition contains two related but separate phrases, with the first prohibiting minor's possession of dangerous or deadly objects and the second prohibiting his association with persons in possession of such objects. As drafted, the word "knowingly" modifies the verbs "own, use, or possess," but does not modify the second phrase's verb, "remain." As such, we find that there is no express scienter element related to the prohibition of minor's association with persons possessing the prohibited objects.

Regarding implied knowledge, *In re Victor L.* (2010) 182 Cal.App.4th 902 (*Victor L.*), considered and rejected a similar argument related to a condition prohibiting a minor from " 'remain[ing] in any building, vehicle or in the presence of any person where dangerous or deadly weapons or firearms or ammunition exist.' " (*Id.* at p. 912.) That court concluded the condition provided insufficient advanced notice of the conduct it prohibited. (*Id.* at p. 913.)

One could construe condition 20 and its use of the verb "remain" to prohibit only minor's continued presence where another person possesses a prohibited object once minor learns of its presence. Although this is a reasonable construction of the condition, it could also be construed to prohibit minor's presence regardless of his knowledge of the existence of a weapon. In light of these competing interpretations, we find the condition "forbids ... the doing of an act in terms so vague that [persons] of common intelligence

must necessarily guess at its meaning and differ as to its application ... .” (*Connally v. General Const. Co.* (1926) 269 U.S. 385, 391.) As stated in *Victor L.*, due process requires “that the probationer be informed *in advance* whether his conduct comports with or violates a condition of probation.” (*Victor L., supra*, 182 Cal.App.4th at p. 913.) Condition 20 does not meet this standard. For this reason, we will modify condition 20 to prohibit minor from remaining in any place where he knows another person possesses a prohibited object.

## **2. Defining Objects Capable of Use in a Dangerous or Deadly Manner**

Minor claims condition 20 prevents him from possessing, or associating with others who possess, a category of objects that is unconstitutionally overbroad because “many everyday items” could fall into the definition of “an object that is capable of being used in a dangerous or deadly manner.” We agree.

The purpose of condition 20 is to prevent minor from accessing weapons and objects that could be used as weapons. Because preventing access to weapons is related to a juvenile’s reformation and rehabilitation, a properly drafted condition regarding this subject matter is permissible. However, condition 20 is so broad as to prohibit access to a multitude of ordinary items. A cursory survey of objects found in most kitchens discloses dozens of items that would meet this definition, including such seemingly innocuous items as a frying pan, a coffee pot, or even a cookie jar. With sufficient intent to harm, each of these items can be used as a dangerous or deadly weapon. (See *Conine v. State* (Wyo. 2008) 197 P.3d 156, 160 [affirming assault with deadly weapon based on attack with frying pan]; *People v. Adolph* (N.Y. Sup.Ct., App.Div. 2002) 750 N.Y.S.2d 593, 594 [affirming reckless assault conviction after defendant threw coffee pot at victim]; *In re Rholetter* (N.C.Ct.App. 2004) 592 S.E.2d 237, 239 [affirming removal of custody after stepmother “hit [child] in the side of the head and shoulder with a cookie jar, causing the cookie jar to break”].) Because the condition does not limit its

prohibition to objects minor intends to use as a weapon, it is unconstitutionally overbroad.

We may modify probation conditions to render an otherwise unconstitutional condition constitutional. (See *Sheena K.*, *supra*, 40 Cal.4th at p. 892.) Though we could simply add an intent element to the condition, this would narrow the condition to an unnecessary degree. Case law in California establishes that certain objects are “inherently deadly or dangerous,” including dirks and blackjacks. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028-1029.) Firearms also meet the definition of an inherently deadly or dangerous weapon. Because “the ordinary use for which they are designed establishes their character” as inherently deadly or dangerous weapons, it is unnecessary to further require that minor intend to use these objects in a deadly or dangerous manner. (*Id.* at p. 1029.)

Accordingly, we modify condition 20 to read: “That said minor not knowingly own, use, or possess either: (i) an ‘inherently deadly or dangerous’ weapon (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028-1029) or (ii) an object that is capable of being used in a dangerous or deadly manner with intent to use that object in such a manner; and that said minor not remain in any place where he knows another person possesses either: (i) an ‘inherently deadly or dangerous’ weapon (*ibid.*) or (ii) an object capable of being used in a dangerous or deadly manner with knowledge that the other person intends to use that object in such a manner.”

### **III. DISPOSITION**

Condition 13 is modified to read: “That said minor not change his place of residence without prior approval of the court.” Condition 20 is modified to read: “That said minor not knowingly own, use, or possess either: (i) an ‘inherently deadly or dangerous’ weapon (*ibid.*) or (ii) an object that is capable of being used in a dangerous or deadly manner with intent to use that object in such a manner; and that said minor not remain in any place where he knows another person possesses either: (i) an ‘inherently

deadly or dangerous' weapon (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028-1029) or  
(ii) an object capable of being used in a dangerous or deadly manner with knowledge that  
the other person intends to use that object in such a manner.” As so modified, the order is  
affirmed.



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Grover, J.

**WE CONCUR:**

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Elia, Acting P.J.

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Mihara, J.